2013 WL 1567820 (Kan.App.) (Appellate Brief)
Court of Appeals of Kansas.

STATE OF KANSAS, Plaintiff-Appellee,
v.
Norvelle L. AHART, Defendant-Appellant.

No. 12-108086-A.
March 22, 2013.

Appeal from the District Court of Johnson County, Kansas
Honorable Stephen R. Tatum, District Judge
District Court Case No. 10 CR 603

Brief of Appellee

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1** ***ISSUE ON APPEAL

I. Does the language the mistreatment of a dependent adult statute convey a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice?

STATEMENT OF FACTS

A jury convicted Norvelle Ahart of two counts criminal mistreatment of a dependent adult. (XI, 956).

At trial, evidence was presented that Alden Burks Smith, Sr. was born in 1915. He was a fighter pilot in World War II, and a successful businessman after returning home. (VII, ***2** 39-40). Mrs. Nadine Smith was a housewife and founder of the Animal Haven pet shelter. (VII, 39).

By 1991 to 1992, however, Mr. Smith had changed. (VIII, 367). Mr. Smith began losing his ability to discern what mail was actually important, particularly for taxes. And he became increasingly interested in the Publisher's Clearing House. (VII, 45).

The Smiths hired Norvelle Ahart in 1994, shortly after Mrs. Smith received heart bypass surgery. (VII, 34). Over the years of Ahart's employment, the defendant slowly took more and more control over the lives and financial resources of Mr. and Mrs. Smith.

In 1996, Mr. Smith gave his son, Alden Burks Smith, Jr., a durable power of attorney. Burks started preparing his father's income tax returns. (VII, 42). Burks visited his father every Sunday. (VII, 79).

In 1997, Mr. Smith wandered from his home and returned without his pants. Burks believed Mr. Smith had become incontinent, but Mr. Smith did not know where his pants went. (VII, 45-46). In 1997, surgeons placed a shunt in Mr. Smith's brain to drain fluid accumulation. (VDT, 374).

Prior to Ahart's employment, Burks' relationship with his parents was “excellent.” (VII, 90). Burks worked with his father for 12 years and they were very close. (VII, 90). Burks' brother, Wayne Smith, worked with their father for 20 years. (VIII, 363; VII, 34).

During the late 1990‘s, however, Ahart became hostile toward Burks because he would not report her income as lower than it really was for tax purposes. This led to a shift in her overall behavior. (VII, 50-51).

***3** In October 2000, Mr. Smith underwent a second operation on the shunt. (VIII, 373). The day after that surgery, Mr. and Mrs. Smith met with an attorney about their wills and power of attorney. (IX, 481). The Smiths transferred the power of attorney from Burks to Ahart. (IX, 481-86). The new wills also gave $100,000 apiece to Ahart and her daughter, Debra Burton. (VII, 62-63). Burks asked his mother what attorney they visited but Mrs. Smith could not recall. (VII, 64). In December 2000, Burks had another conversation with his mother, who was under the belief that her long-deceased parents were still alive. (VII, 63). Mrs. Smith died in 2003. (VII, 38).

From the time Ahart gained power of attorney until the last years of Mr. and Mrs. Smiths' lives, Ahart used her position to expend vast amounts of the Smiths' wealth. In 1999, Mr. and Mrs. Smith had combined accounts totaling about $4.9 million. By 2008, that total had dwindled to about $1.49 million. (X, 736-37).

After the year 2000, everyone who worked in the household was either a relative or a close friend of Ahart. (VIII, 277). The primary workers were: Ahart; her daughter, Debra Burton; and her granddaughter, Priscilla Morgan. (VIII, 199-201). They all lacked medical training. (VIII, 199-200; 267). The other staff included Ahart's brothers, daughters, grandchildren and close friends. (VII, 204-07).

Ahart determined the rate of pay for all the employees in the Smith home. (VIII, 225). The total salaries for employees at the house from 2000 to 2009 totaled $1,680,816. (X, 754). Debra Burton's salary increased from $26,520 in 2000 to $02,294 by 2009. There was no discussion for the reasons behind the pay increases. (VIII, 229-31). In 2004, Ahart also wrote her daughter Burton a $100,000 check, which was signed by Mr. Smith. (VII, 250-55). ***4** Priscilla Morgan, Ahart's granddaughter, received pay increases from $21,387.50 in 2000 to $72,652 in 2008. (VIII, 279-81). Ahart also wrote significant amounts of checks simply to cash, such as $81,000 in checks made in 2007. (X, 745).

Family members and household workers witnessed many instances of Ahart manipulating Mr. Smith's fears and increasing dementia to distance him from his family. Wayne Smith believed that “nursing homes were probably something my dad feared above anything else. He was terrified of nursing homes.” (VIII, 375). The Smith sons would never discuss nursing homes in front of their father because “that would be like showing kryptonite to Superman.” (VIII, 376). Both sons agreed that nursing homes were not appropriate for their father. (VIII, 376). Many people, however, witnessed Ahart tell Mr. Smith that his sons would put him in a nursing home. Debra Burton twice witnessed Ahart upsetting Mr. Smith by telling him that his sons Burks and Wayne would put him in a home. (VIII, 242-243).

Debra Burton told Wayne that Ahart intended to spend all of Mr. Smith's money, and Ahart did not want Wayne or Burks to inherit anything. (VIII, 388-89). Priscilla Morgan told Wayne that Ahart said she was going to get a lot of money when she took over as executor of the estate. (VIII, 391-92). Priscilla told Wayne that Ahart was trying to get him written out of Mr. Smith's will and trust. (VIII, 391). Priscilla also said Ahart would tell Mr. Smith that the sons were trying to put him in a nursing home, or they were out to control Mr. Smith. (VIII, 392). Wayne witnessed Ahart tell Mr. Smith that Burks was “not out to get you, he's out to control you.” (VIII, 393). Eventully, Ahart had all financial documents mailed to her own residence rather than to Mr. Smith's home. (VIII, 294).

***5** Other household workers also testified to the manipulation that took place. Debra Hoemer, a former caretaker and friend of Ahart, testified that Ahart would go grocery shopping for Mr. Smith and take a portion ofthe groceries home herself. (VIII, 351). Hoerner believed that Mr. Smith's medications were being used to manipulate his moods to make him more or less combative. (VIII, 352-54). Hoerner also participated in discussions where Ahart wanted to sell the house because they were running out of money. (VIII, 354). The environment at the Smith household was “always arguing or confrontation, chaos, something. It was always something going on.” (VIII, 355). This arguing would be in front of Mr. Smith. (VIII, 355).

Smith's sons filed a civil action in 2008 to regain control of their father's assets after seeing a distressing financial statement. (VII, 80). The action was unsuccessful due to lack of standing. (VII, 81).

By 2009, Mr. Smith's mental status was constantly deteriorating. Mr. Smith died in August 2010. (VII, 88). By that point, Mr. Smith's personal finances had decreased by approximately $3.5 million. (X, 373).

Ahart was convicted of two counts criminal mistreatment of a dependent adult in a five-day jury trial. (XI, 882,956). District Judge Stephen R. Tatum court sentenced Ahart to two consecutive 12-month sentences. He placed Ahart on probation for 24 months. He ordered that she serve 30 days' shock time in order to make a statement. He explained that this kind of behavior cannot be tolerated in the community because the elderly is one of the two very vulnerable populations in our society. (XII, 24).

Ahart brings this appeal. (I, 72).

***6 ARGUMENTS AND AUTHORITIES**

I. The language of the mistreatment of a dependent adult statute is not unconstitutionally vague because it conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice.

Ahart argues that Judge Tatum erred in denying her motion to declare K.S.A. 21-3437 unconstitutional.

A. Standard of Appellate Review.

Whether a statute is unconstitutionally vague is a question of law over which appellate review is de novo and unlimited. *State v. Armstrong*, 276 Kan. 819, 821, 80 P.3d 378 (2003).

The constitutionality of a statute is presumed. All doubts must be resolved in favor of its validity, and before the act may be stricken down it must clearly appear that the statute violates the constitution. In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it. If there is any reasonable way to construe the statute as constitutionally valid, that should be done. A statute should not be stricken down unless the infringement of the superior law is clear beyond substantial doubt. State v. Armstrong, 276 Kan. at 821.

B. Language of Mistreatment of a Dependent Adult Statute.

"Mistreatment of a dependent adult is knowingly and intentionally... taking **unfair advantage** of a dependent adul's physical or financial resources for another individual's personal or financial advantage by the use of **undue influence,** coercion, harassment, duress, deception, false representation or false pretense." K.S.A. 21-3437; see also K.S.A. 2011 Supp. 21-5417 (same, but omits the term "intentionally"). (Emphasis added).

***7** Ahart limited her vagueness challenge to the terms "unfair advantage" and "undue influence." Judge Tatum ruled that by reading the terms in the "totality of the allegation, puts those terms in perspective" and with that, the common sense meaning is not vague. (V, 7). Judge Tatum ruled:
[T]he reading of the charges, by way of the totality of the allegations, puts those terms in perspective and as to the common sense meaning of those terms to a point where they are not vague and to the point where they do reasonably advise a person who might be subject to these kinds of charges of the... common sense meaning of those terms.

The Court cannot find that they are vague to the point of violating due process or fundamental fairness in this case. And that persons of common intelligence would not have to guess at their meaning.

(V, 7-8). He denied the motion to dismiss as constitutionally vague. (V, 8). He made a similar ruling at the close of the State's evidence at trial. (X, 829).

Judge Tatum defined unfair advantage for the jury as "the ability to take advantage of another person in a dishonest, fraudulent or deceitful way." (I, 58).

He defined the term undue influence as:

> [T]he improper use of power or trust in any way that deprives a person of free will and substitutes another's objective. The test of undue influence is whether the party exercised his own free will and acted voluntarily by the use of his own reason and judgment, and that the mere fact that there may have been opportunity to exercise undue influence of overreaching does not permit the inference that such influence was exercised.

(I, 58).

When defense counsel moved to strike all of the options within a means from the elements instruction (coercion, harassment, duress, deception, false representation or false pretense), Judge Tatum recalled there was testimony that Ahart told Mr. Smith that his sons. ***8** wanted him to go to a nursing home. And it could be reasonably inferred that things happened subsequent to

that information that was given to Mr. Smith. Judge Tatum did, however, strike the terms "coercion, harassment and duress" from the jury instruction. (X, 831-32). The jury was instructed concerning undue influence, deception or false pretense. (I, 55-56).

C. The statute is not vague.

The test to determine whether a statute is void for vagueness is whether the statute's language conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. A statute that either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process. *State v. Richardson*, 289 Kan. 118, 124, 209 P.3d 696 (2009); *State v. Adams*, 254 Kan. 436, 439, 866 P.2d 1017 (1994).

In determining whether a statute is void for vagueness, two inquiries are appropriate: (1) whether the statute gives fair warning to those persons potentially subject to it; and (2) whether the statute adequately guards against arbitrary and discriminatory enforcement. *City of Wichita v. Wallace*, 246 Kan. 253, 259, 788 P.2d 270 (1990).

A statute is not void for vagueness and uncertainty where it employs words commonly used or previously judicially defined, or the words have a settled meaning in law. *State v. Kirkland*, 17 Kan.App.2d 425, 428-29, 873 P.2d 846, rev. denied 251 Kan. 941 (1992).

***9** The words in K.S.A. 21-3523 "shall be construed according to the context and the approved usage of the language." K.S.A. 77-201 (Second). See also *Burns v. Alcala*, 420 U.S. 575, 580-81, 95 S. Ct. 1180, 43 L. Ed. 2d 469 (1975) (The general rule is that words of a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary).

The words "undue" and "influence" clearly explains the action. "Undue" means "1. unwarranted; excessive 2. inappropriate; unjustifiable; improper" *The Random House Dictionary of the English Language* at 2066 (2nd ed. unabridged 1987). "Influence" means "1. the capacity or power of persons or things to be a compelling force on or produce effects on the actions, behaviors, opinions, etc. of others." *The Random House Dictionary of the English Language* at 980 (2nd ed. unabridged 1987). Undue influence is the power of a person to compel the actions of another that is unwarranted or excessive.

"Undue influence" is a well-defined term. Undue influence is "The improper use of power or trust in a way that deprives a person of free will and substitutes another's objective." *Black's Law Dictionary* 1666 (9th ed. 2009). Defendant's proposed instruction defining undue influence was based on the well-settled case of *Hotchkiss v. Werth*, 207 Kan. 132, 141,483 P.2d 1053 (1971). (I, 36). This was similar to the instruction that Judge Tatum gave to the jury. (I, 58).

The jury was also instructed that "unfair advantage" was "the ability to take advantage of another person in a dishonest, fraudulent or deceitful way." (I, 58). "Unfair" means "1. not fair; not conforming to approved standards, as of justice, honesty, or ethics 2. disproportionate; undue beyond what is proper or fitting." *The Random House Dictionary* ***10** *of the English Language* 2067 (2nd ed. unabridged, 1987). "Advantage" means "2. benefit; gain; profit. 3. superiority or ascendancy." *The Random House Dictionary*, *supra*, at 28.

To challenge the constitutionality of a statute, the appellant must have been directly affected by the alleged defect. *State v. Coman*, 294 Kan. 84, Syl. ¶3, 273 P.3d 701 (2012). The language of K.S.A. 21-3437 conveyed a definite warning to Ahart, when measured by common understanding and practice, that it is a crime to take advantage of an aging veteran's severe dementia and fears of placement in a nursing home to obtain a power of attorney and expend more than $3 million of his estate in an effort to prevent the sons from receiving any inheritance.

Ahart created stories to drive a wedge to fracture the Smith Family. (XI, 886). Defendant consistently talked Mr. Smith into things he did not agree with over the years. (XI, 886-87). Ahart was overheard trying to convince Mr. Smith to write his sons out

of the will. (XI, 887). She took advantage of “the victim's very large fear of being placed in a nursing home. And she used that to drive a wedge, to create a distrust, between Mr. Smith and his sons.” (XI, 887). She created a theme with the victim that his son “is not out to get you, Alden. Burks is out to control you.” (XI, 890). The defendant set her own wages as caretaker. In the end, it was $40 an hour - $102,000 a year for her and $72,000 for her daughter Priscilla. (XI, 937). There was no provision in the will for the defendant to drain the estate by writing check after check. There were no provisions in the will for the defendant to pay herself, her daughter and her granddaughter an excessive amount of pay. The defendant made herself the de facto beneficiary of the will. If she couldn't get the will changed, she could drain the estate and circumvent the will. (XI, 943).

*11 CONCLUSION

K.S.A. 21-3437 is not so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. There is nothing confusing about the words the terms “unfair advantage” and “undue influence.” They are words commonly understood by ordinary laymen when construed according to the context and the approved usage of the language. Norvelle Ahart was not an unsuspecting citizen ensnared by vague statutory language. The State of Kansas requests that her convictions be affirmed.

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